



COBRA STRIKE 3: ANOTHER EXTENSION OF COBRA SUBSIDY

The COBRA subsidy was originally enacted in the American Recovery and Reinvestment Act of 2009 (“ARRA”) to provide subsidized COBRA benefits to assistance eligible individuals who were involuntarily terminated from employment between September 1, 2008, and December 31, 2009. The Department of Defense Appropriations Act, 2010 (“DOD Act”) extended the availability of the subsidy to assistance eligible individuals who were involuntarily terminated through February 28, 2010. The Temporary Extension Act of 2010 (the “TEA”), signed into law on March 2, 2010, provides an additional extension of the COBRA subsidy to involuntary terminations occurring through March 31, 2010. In addition to the extension of the involuntary termination period, the TEA made other changes to the COBRA subsidy provisions of ARRA. (For more information about the COBRA subsidy, see the *Jones Day Commentary* entitled “Group Health Plan Continuation Coverage: Fast Action Required To Comply with New COBRA Premium Assistance

Requirements,” February 2009, at http://www.jones-day.com/pubs/pubs__detail.aspx?pubID=S5943, and “Extension of COBRA Subsidy for Assistance Eligible Individuals,” January 2010, at http://www.jonesday.com/extension_of_cobra/.)

NEW CATEGORY OF ASSISTANCE ELIGIBLE INDIVIDUALS: REDUCTION OF HOURS FOLLOWED BY INVOLUNTARY TERMINATION

The TEA amended the definition of an “assistance eligible individual” to include any individual who:

- had a COBRA-qualifying event and a loss of coverage under his or her employer’s health plan due to a reduction of hours of employment occurring on or after September 1, 2008,

- failed to elect, or elected but subsequently dropped, COBRA continuation coverage under his or her employer's health plan, and
- subsequent to the reduction of hours of employment and *after March 2, 2010*, was involuntarily terminated from employment.

An individual described above will now be treated as an assistance eligible individual for purposes of the COBRA subsidy. The maximum duration of such individual's COBRA coverage, however, will be measured from the reduction in hours of employment that caused the loss of coverage, not the involuntary termination of employment. The period of time between an individual's reduction in hours of employment and his or her involuntary termination of employment will count against the maximum COBRA period. The TEA provisions applicable to such individuals will be effective only for periods of coverage beginning after March 2, 2010 (e.g., for plans providing coverage on a monthly basis, on and after April 1, 2010).

NOTE: The TEA does not require individuals who are entitled to COBRA continuation coverage and the subsidy due to a reduction in hours of employment followed by an involuntary termination of employment to pay COBRA premiums or to receive any coverage for the period between the reduction in hours and the involuntary termination of employment.

NOTICE REQUIREMENTS FOR INDIVIDUALS WITH REDUCTION IN HOURS OF EMPLOYMENT

If an employee is involuntarily terminated after March 2, 2010, and after an earlier reduction in hours of employment, sponsors of self-insured health plans and insurance issuers have *60 days* from the individual's involuntary termination

of employment to provide an additional COBRA notice to the assistance eligible individuals. This additional notice must comply with the notice requirements under ARRA, as amended by the DOD Act and the TEA.

DETERMINATION OF INVOLUNTARY TERMINATION OF EMPLOYMENT

A welcome relief for employers comes in the form of a safe harbor for an employer's determination of whether or not an employee has been involuntarily terminated for purposes of the COBRA subsidy. As long as the employer's determination is based on a reasonable interpretation of ARRA and supported by documentation, the termination will be deemed to be an involuntary termination of employment. Supporting documentation must include an attestation by the employer of the involuntary termination.

PENALTIES AND CIVIL ACTION FOR COBRA SUBSIDY VIOLATIONS

The COBRA subsidy provisions provide for the Secretary of Labor (or, in some cases, the Secretary of Health and Human Services), in consultation with the Secretary of the Treasury, to provide an expedited review if an employer determines that an employee is not eligible for the COBRA subsidy. The TEA specifies that the applicable Secretary or an affected individual may bring a civil action to enforce such a determination by the Secretary and for appropriate relief. The TEA does not describe what constitutes "appropriate relief." In addition, in the event that a plan sponsor or insurance issuer fails to comply with such Secretary's determination after 10 days following receipt of the Secretary's notification of determination, the Secretary may assess penalties for each failure of up to \$110 per day.

IN CONCLUSION

The TEA extends the COBRA subsidy to involuntary terminations occurring through March 31, 2010. It also expands the reach of the COBRA subsidy to an employee who lost his or her health coverage due to a reduction in hours of employment prior to an involuntary termination of employment. Additional notices must be provided to such individuals within 60 days after the involuntary termination. Employers should update their procedures and maintain supporting documentation for involuntary termination decisions. Failure to comply with the requirements of ARRA, as amended, may lead to substantial penalties and civil action.

LAWYER CONTACTS

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